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EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd and another case

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-96–06 OF 2019 AND WA-24C-116–07 OF 2019
LIM CHONG FONG J
1 JUNE 2020

C

Building and Construction Law — Construction contract — Adjudication — Cross applications to set aside and enforce adjudication decision — Whether adjudicator acted in excess of jurisdiction — Whether there was denial of natural justice — Whether adjudication decision improperly procured by fraud — Whether adjudication decision ought to be enforced — Construction Industry Payment and Adjudication Act 2012 ss 15 & 28

D

Civil Procedure — Judge — Recusal — Judge invited to refuse from hearing originating summons — Whether there was real danger of bias — Whether judge ought to recuse himself

E

These were cross applications to set aside the adjudication decision as well as to enforce the adjudication decision made pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). EA Technique (M) Sdn Bhd ('EAT') as the applicant in OS 1 and respondent in OS 2 was a private limited company involved in the oil and gas and marine business while Malaysia Marine and Heavy Engineering Sdn Bhd ('MMHE') as the applicant in OS 2 and respondent in OS 1 was also a private limited company involved in the ship/vessel marine business. By a letter of award, EAT appointed MMHE to provide for the demolition, refurbishment and conversion of donor vessel into floating, storage and offloading ('FSO') facility ('vessel'). The parties also executed the conditions of contract ('contract'). During the course of the performance of the contract, EAT issued instructions for additional works to be carried out ('AWO'). They were duly carried out and MMHE accordingly submitted its invoiced claims to EAT. The invoiced claims of MMHE were disputed by EAT. The dispute eventually culminated in EAT initiating arbitration proceedings seeking to declare that MMHE was not entitled to the payment as claimed whilst MMHE initiated statutory adjudication under the CIPAA to claim its invoiced claims of US$30,211,301.42 from EAT. The adjudicator ordered EAT to pay the sum of US$21,520,006.38 to MMHE. EAT was dissatisfied with the decision and had filed OS 1 to set aside the decision pursuant to s 15 of the CIPAA. Subsequently, MMHE filed OS 2 to enforce the decision pursuant to s 28 of the CIPAA.

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Held, dismissing OS 1 with costs of RM30,000 and allowing OS 2 with costs of RM30,000:

(1) The judge was by no means bound by his own views. It did not also matter so long natural justice was observed when both parties had been given full opportunity to ventilate their arguments to facilitate the making of an ultimate reasoned decision. On this footing, there was no real danger of bias and recusal was declined (see paras 21–22).

(2) The counter contention by EAT that s 4 of the CIPAA should be construed ejusdem generis was misplaced because the appropriate genus of 'affixed work' could not be satisfactorily discerned from sub-ss (a)–(e) of s 4 of the CIPAA per se based either on the literal interpretation of the statute or the purposive interpretation of the statute pursuant to s 17A of the Interpretation Act 1967. It required legislative amendment to give effect to the same. The vessel was physically and functionally integrated to the central processing plant which was a fixture affixed to the seabed. In the premises, it was an integral part within the definition of 'construction work' in s 4 of the CIPAA. Consequently, a FSO vessel particularly the vessel here was an adjudicatable issue within the core jurisdiction of the adjudicator in the adjudication proceedings (see paras 31–33).

(3) The AWO were made pursuant to the contract which was plainly in writing. When EAT did not raise objection to the contents of the AWO, it must thus be deemed that EAT had waived, acquiesced or accepted that they were issued pursuant to the contract. Accordingly, EAT was also estopped from insisting on strict compliance of article 13 of the conditions of contract. In the premises, the AWO were properly issued pursuant to the contract and was hence an adjudicatable issue within the core and/or contingent jurisdiction of the adjudicator in the adjudication proceedings (see paras 41 & 44–45).

(4) The application under s 15 of the CIPAA was not an appeal and EAT was questioning the merits of the adjudicator's decision here. The decision of the adjudicator was binding by virtue of s 13 of the CIPAA even if he had wrongly answered the right questions or issues including on the adequacy or otherwise of adduction of evidence before him. If EAT was dissatisfied with it, the recourse was to have it finally determined either by arbitration or litigation in court. Therefore, EAT did not make out a case on denial of natural justice on the part of the adjudicator (see paras 50–51).

(5) There were no authoritative notes of proceedings or cogent correspondences adduced in the affidavits here of both the adjudication and arbitration proceedings to enable the court to make any meaningful appraisal of what actually happened. The court was not armed with any cogent evidence to make an adverse finding against MMHE even on the

standard of proof on the balance of probabilities. If the adjudicator was however persuaded by MMHE, albeit incorrectly or even misleadingly, this was not fraud as envisaged by s 15(a) of the CIPAA to warrant the setting aside of the decision. In conclusion, EAT had not successfully made out a meritorious challenge against the decision under s 15 of the CIPAA (see paras 55–58).

(6) EAT had made an active challenge via OS 1 but the court had found that the challenge was unmeritorious. It consequently followed that MMHE had successfully made out its case to have the decision enforced pursuant to s 28 of the CIPAA (see paras 61–62).

[Bahasa Malaysia summary

Ini adalah permohonan silang untuk mengetepikan keputusan adjudikasi dan juga untuk menguatkuasakan keputusan adjudikasi yang dibuat berdasarkan Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'). EA Technique (M) Sdn Bhd ('EAT') sebagai pemohon dalam OS 1 dan responden dalam OS 2 adalah syarikat sendirian berhad yang terlibat dalam perniagaan minyak dan gas dan marin manakala Malaysia Marine and Heavy Engineering Sdn Bhd ('MMHE') sebagai pemohon dalam OS 2 dan responden di OS 1 juga merupakan syarikat sendirian berhad yang terlibat dalam perniagaan kapal/kapal laut. Melalui satu surat award, EAT melantik MMHE untuk menguruskan perobohan, pembaikan dan penukaran kapal donor menjadi fasiliti floating, storage and offloading ('FSO') ('kapal'). Pihak-pihak juga menandatangani syarat kontrak ('kontrak'). Sepanjang pelaksanaan kontrak, EAT mengeluarkan arahan agar kerja-kerja tambahan dijalankan ('AWO'). Ia telah dilaksanakan dengan sewajarnya dan MMHE dengan sewajarnya menyerahkan tuntutan invois kepada EAT. Tuntutan invois MMHE dipertikaikan oleh EAT. Pertikaian tersebut akhirnya memuncak dengan EAT memulakan prosiding adjudikasi yang memohon bahawa MMHE tidak berhak atas pembayaran seperti yang dituntut sementara MMHE memulakan adjudikasi statutori di bawah APAIP untuk menuntut tuntutan invois sebanyak US$30,211,301.42 daripada EAT. Adjudikator memerintahkan EAT untuk membayar sejumlah US$21,520,006.38 kepada MMHE. EAT tidak berpuas hati dengan keputusan itu dan telah memfailkan OS 1 untuk mengetepikan keputusan tersebut berdasarkan s 15 APAIP. Selepas itu, MMHE memfailkan OS 2 untuk menguatkuasakan keputusan berdasarkan s 28 APAIP.

Diputuskan, menolak OS 1 dengan kos RM30,000 dan membenarkan OS 2 dengan kos RM30,000:

(1) Hakim tidak terikat dengan pandangannya sendiri. Ia juga tidak menjadi masalah selagi keadilan semula jadi dipatuhi ketika kedua-dua pihak diberi kesempatan penuh untuk menyuarakan hujahan mereka untuk membantu pembuatan keputusan yang kukuh. Pada asas ini, tiada

bahaya berat sebelah yang nyata dan penolakan ditolak (lihat perenggan 21–22).

(2) Pertentangan balas oleh EAT bahawa s 4 APAIP harus ditafsirkan sebagai ejusdem generis adalah salah tempat kerana genus yang sesuai untuk 'kerja lekapan' tidak dapat dinyatakan dengan memuaskan dari sub-ss (a)–(e) s 4 APAIP berdasarkan sama ada pada tafsiran literal undang-undang atau tafsiran bertujuan undang-undang menurut s 17A Akta Tafsiran 1967. Ia memerlukan pindaan perundangan untuk memberi kesan yang sama. Kapal telah disatukan secara fizikal dan fungsi ke kilang pemprosesan pusat yang merupakan lekapan yang dilekatkan di dasar laut. Oleh itu, ia adalah bahagian penting dalam definisi 'kerja pembinaan' di s 4 APAIP. Akibatnya, kapal FSO terutama kapal di sini adalah isu yang dapat diadili dalam bidang kuasa teras adjudikator dalam proses adjudikasi (lihat perenggan 31–33).

(3) AWO dibuat berdasarkan kontrak yang secara bertulis. Apabila EAT tidak membantah kandungan AWO, maka EAT harus dianggap bahawa EAT telah mengetepikan, menyetujui atau menerima bahawa mereka dikeluarkan berdasarkan kontrak. Oleh itu, EAT juga diestop daripada menegaskan pematuhan ketat terhadap perkara 13 syarat kontrak. Oleh itu, AWO dikeluarkan dengan tepat berdasarkan kontrak dan oleh itu merupakan isu yang dapat diadili dalam bidang kuasa teras dan/atau kontinjen adjudikator dalam prosiding adjudikasi (lihat perenggan 41 & 44–45).

(4) Permohonan di bawah s 15 APAIP bukanlah rayuan dan EAT menyoal merit keputusan adjudikasi di sini. Keputusan adjudikator mengikat berdasarkan s 13 APAIP walaupun dia telah salah menjawab persoalan atau isu termasuk mengenai kecukupan atau tidak penambahan bukti di hadapannya. Sekiranya EAT tidak berpuas hati dengannya, jalan keluar adalah untuk akhirnya ditentukan sama ada dengan timbang tara atau litigasi di mahkamah. Oleh itu, EAT tidak membuktikan kes penolakan keadilan semula jadi dari pihak adjudikator (lihat perenggan 49–51).

(5) Tiada nota prosiding yang autoritatif atau surat-menyurat meyakinkan yang disertakan dalam afidavit di sini dalam kedua-dua prosiding adjudikasi dan timbang tara untuk membolehkan mahkamah membuat penilaian yang bermakna mengenai apa yang sebenarnya berlaku. Mahkamah tidak disediakan dengan keterangan yang meyakinkan untuk membuat dapatan bertentangan terhadap MMHE walaupun pada beban pembuktian atas imbangan kebarangkalian. Sekiranya adjudikator itu dipengaruhi oleh MMHE, walaupun tidak benar atau bahkan menyesatkan, ia bukan penipuan seperti yang dibayangkan oleh s 15(a) APAIP untuk membenarkan pengetepian keputusan tersebut. Kesimpulannya, EAT tidak berjaya membuat cabaran yang bermerit terhadap keputusan di bawah s 15 APAIP (lihat perenggan 55–58).

A (6) EAT telah membuat bantahan aktif melalui OS 1 tetapi mahkamah telah mendapati bahawa bantahan itu tidak bermerit. Oleh itu, MMHE telah berjaya membuktikan kesnya agar keputusan tersebut dapat dikuatkuasakan sesuai dengan s 28 APAIP (lihat perenggan 61–62).]

B **Cases referred to**

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776; [2016] 1 LNS 1522, CA (refd)

BOM v BOK and another appeal [2019] 1 SLR 349, CA (refd)

C *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173; [2012] 4 CLJ 445, FC (refd)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1; [2015] 4 CLJ 561, FC (refd)

Enra Engineering and Fabrication Sdn Bhd v Gemula Sdn Bhd and another summon [2019] MLJU 369; [2019] 10 CLJ 333, HC (refd)

D *Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd and another appeal* [2019] MLJU 1477; [2020] 1 AMR 193, HC (refd)

Glomac Resources Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan & Anor [2016] 9 MLJ 584, FC (refd)

E *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542; [2019] 1 CLJ 592, CA

Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019] 2 MLJ 362; [2019] 2 CLJ 229, CA (refd)

F *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)

Locabail (UK) Ltd v Bayfield Properties Ltd and Another & Other Cases [2000] 1 All ER 65, CA (refd)

G *MIR Valve Sdn Bhd v TH Heavy Engineering Bhd and other cases* [2018] 7 MLJ 796; [2017] 8 CLJ 208, HC (folld)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungei Selangor Dengan Tanggungan [1993] 3 MLJ 1, CA (refd)

Mecomb Malaysia Sdn Bhd v VST M&E Sdn Bhd [2018] MLJU 265; [2018] 8 CLJ 380, HC (refd)

H *PBS Energo AG v Bester Generacion UK Ltd* [2019] EWHC 996 (TCC) (refd)

Ranhill E&C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873, HC (refd)

SG South Ltd v King's Heed Cirencester LLP [2009] EWHC 2645 (TCC) (refd)

SQA Builders Sdn Bhd v Luxor YRM Sdn Bhd and another suit [2018] 10 MLJ 759; [2017] 1 LNS 796, HC (refd)

I *TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd and another case* [2018] MLJU 217; [2018] 1 LNS 145, HC (refd)

Tan Eng Han Construction Sdn Bhd v Sistem Duta Sdn Bhd [2018] 12 MLJ 395; [2018] 1 LNS 428, HC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (distd)
Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals [2017] 3 MLJ 350, CA (refd)
YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications [2017] MLJU 632; [2017] 1 LNS 601, HC (refd)
Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case [2017] MLJU 146; [2017] 1 LNS 185, HC (refd)

Legislation referred to

Lembaga Pembangunan Industri Pembinaan Malaysia Act s 2
Construction Industry Payment and Adjudication Act 2012 ss 4, 4(a), (b), (c), (d), (e), 15, 15(a), 28
Factories and Machinery Act 1967 s 3
Interpretation Act 1967 s 17A

Chong Boon Leong (Kamilah Kasim, Esra Voon Bu Khiong, Nadia Farhana bt Zainuddin with him) (Rahmat Lim & Partners) in Originating Summons No WA-24C-96–06 of 2019 for the plaintiff.
Mohanadass Kanabasagai (Kalashini Sandrasegaran and Thomas Shaun Mathews with him) (Mohanadass Partnership) in Originating Summons No WA-24C-116–07 of 2019 for the plaintiff.
Chong Boon Leong (Kamilah Kasim, Esra Voon Bu Khiong, Nadia Farhana bt Zainuddin with him) (Rahmat Lim & Partners) in Originating Summons No WA-24C-116–07 of 2019 for the defendant.
Mohanadass Kanabasagai (Kalashini Sandrasegaran and Thomas Shaun Mathews with him) (Mohanadass Partnership) in Originating Summons No WA-24C-96–06 of 2019 for the defendant.

Lim Chong Fong J:

INTRODUCTION

[1] These are cross applications to set aside the adjudication decision as well as to enforce the adjudication decision made pursuant to the Construction Industry Payment and Adjudication Act 2012.

[2] The applicant in Originating Summons No WA-24C-96–06 of 2019 ('OS 1') and the respondent in Originating Summons No WA-24C-116–07 of 2019 ('OS 2') is a private limited company involved in the oil and gas and marine business.

[3] The respondent in OS 1 and the applicant in OS 2 is also a private limited company involved in the ship/vessel marine business.

A **[4]** For ease of reference, they will be referred below by the acronym EAT and MMHE respectively.

SALIENT BACKGROUND FACTS

B **[5]** By a letter of award dated 9 June 2015 ('LA'), ETA appointed MMHE to provide for the demolition, refurbishment and conversion of donor vessel — MT Nautica Bergading (ex-SARK) into Floating, Storage and Offloading ('FSO') Facility ('vessel') for the Full Field Development ('FFD') Project, North Malay Basin (NMB) at the contract price of US$21.8m. Along with the C LA, the parties also executed the conditions of contract ('contract').

[6] During the course of the performance of the contract, EAT issued instructions for additional works to be carried out ('AWO'). They were duly carried out and MMHE accordingly submitted its invoiced claims to EAT. The D invoiced claims of MMHE were disputed by EAT. The dispute eventually culminated in EAT initiating arbitration proceedings seeking to declare that MMHE is not entitled to the payment as claimed whilst MMHE initiated statutory adjudication under the Construction Industry Payment and E Adjudication Act 2012 ('the CIPAA') to claim its invoiced claims of US$30,211,301.42 from EAT.

[7] The appointed adjudicator, Wong Chong Wei ('adjudicator') gave his adjudication decision on 27 May 2019 ('decision'). He, inter alia, ordered EAT F to pay the sum of US$21,520,006.38 to MMHE.

[8] EA was dissatisfied with the decision and has on 4 June 2019 filed OS 1 to set aside the decision pursuant to s 15 of the CIPAA.

G **[9]** Subsequently, MMHE on 2 July 2019 filed OS 2 to enforce the decision pursuant to s 28 of the CIPAA.

[10] The affidavits that were filed for purposes of OS 1 are as follows:

H (a) EAT's affidavit in support affirmed by Saleh bin Muhamad Ali dated 4 June 2019;

(b) EAT's supplementary affidavit affirmed by Saleh bin Muhamad Ali dated 25 June 2019;

I (c) MMHE's affidavit in reply affirmed by Ausmal B Kardin dated 2 July 2019; and

(d) EAT's affidavit in reply affirmed by Saleh bin Muhamad Ali dated 12 July 2019.

[11] The affidavits that were filed for purposes of OS 2 are as follows: **A**

(a) MMHE's affidavit in support affirmed by Ausmal bin Kardin dated 2 July 2019;

(b) EAT's affidavit in reply affirmed by Saleh bin Muhamad Ali dated 18 July 2019; and **B**

(c) MMHE's affidavit in reply affirmed by Ausmal bin Kardin dated 2 August 2019.

[12] Both OS 1 and OS 2 came before me to be heard together. In the course **C** of case management of both of them, I directed the parties to also specifically address me on the issue of whether the vessel which is not a fixture is accommodated in the CIPAA?

[13] After having read the written submissions of the parties and extensive **D** oral arguments of counsel held on 11 October 2019, 14 November 2019 and 18 December 2019, I deferred my decision to deliberate on the arguments put forth by the parties. Having duly done so, I provide below my decision together with the supporting grounds.

E

CONTENTIONS AND FINDINGS

Recusal

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[14] At the outset on the first day of hearing on 11 October 2019, MMHE invited me to refuse from hearing both OS 1 and OS 2 because I have previously expressed a view in a co-authored book and a singularly authored article that a vessel such as a floating, production, storage and off loading ('FPSO') vessel is not a fixture; thus it is not adjudicatable under the CIPAA. **G** This may be seen in the case of *MIR Valve Sdn Bhd v TH Heavy Engineering Bhd and other cases* [2018] 7 MLJ 796; [2017] 8 CLJ 208 where Lee Swee Seng J (now JCA) held as follows:

> [61] I have no quarrel with the wisdom expressed by the learned authors Chow Kok Fong, Lim Chong Fong and Oon Chee Kheng of Adjudication of Construction Payment Disputes in Malaysia, Lexis Nexis in the following passage in the context of excluding ship-building contracts from CIPAA at para [4.12] at p 30: **H**
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> > *Construction works, per se, are annexed to the real property and when completed form part of the real property*. It follows that any component or material which is incorporated as part of the works becomes part of the real property, in contrast with chattels which retain their character as personal property. *For this reason it is considered that the Act would not apply to, for example, a shipbuilding contract notwithstanding that these share many characteristics with that of a construction contract*. (Emphasis added.) **I**

[62] I would say 'ship building' contract is excluded because it does not come under (a) the structures which are mainly buildings on earth, expressed as below or above ground level or (b) the infrastructures as in road, harbour works, railway, cableway, canal or aerodrome for example.

[63] It is more in the form of a chattel but the fact that it may be a chattel is not conclusive that it is not construction work if the chattel is now being converted for use in the 'oil and gas industry'.

[64] My attention was also drawn by learned counsel for the respondent to an article published by Lim Chong Fong in the KLRCA Newsletter Jul–Dec 2012 at p 9 (now Judge of the High Court of Malaya) entitled 'The Legal Implication of CIPAA', wherein he opined as follows:

> It is unclear as to whether ship building such as a FPSO vessel common in the oil & gas industry is encompassed by the CIPAA. Again, it is submitted that the CIPAA does not apply because the genus of the definition of construction work relates to fixtures whereas the FPSO is a chattel. (Emphasis added.)

[65] It is my unfortunate lot to have to agree to disagree with my learned brother Justice Lim Chong Fong on this issue for the reasons given above.

[15] In this respect, MMHE referred me to the recent case of *Glomac Resources Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan & Anor* [2016] 9 MLJ 584 which adopted the principles set out in the Federal Court case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungei Selangor Dengan Tanggungan* [1993] 3 MLJ 1 where Edgar Joesph Jr FCJ held as follows:

> There were some Judges who preferred the 'reasonable suspicion' of bias test (see, eg *The King v Sussex Justices; ex p McCarthy* [1924] 1 KB 256 *Hannam v Bradford Corp* [1970] 1 WLR 937 *R v West York-shire Coroner; ex p Smith (No 2)* (1982) The Times, 6 November, *R v Liverpool FF; ex p Topping* [1983] 1 WLR 119) whilst many preferred the 'real likelihood' test (See eg *R v Barnsley Licensing Justices; ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 *Hannam v Bradford Corp* [1970] 1 WLR 937 *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1969] 1 QB 577 *Steeples v Derbyshire County Council* [1985] 1 WLR 256).
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> In *R v Liverpool City Justices; ex p Topping* [1983] 1 WLR 119 Ackner LJ observed that there is little, if any, difference between the two tests. With respect, we do not agree as Devlin J in *R v Barnesley Licensing Justices* (ibid) had correctly pointed out that the different tests even if applied to the same facts may lead to different results.
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> The conflict of judicial opinion appears to have been resolved by the House of Lords in *R v Gough* [1993] AC 646 when the House applied 'the real danger' of bias test in a criminal case, where a juror had recognized the accused's brother as her next door neighbour, but this was not until after the verdict and it was held that there was no real danger of bias. Lord Goff, speaking for the House, made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors or with arbitrators.
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> Explaining the 'real danger' of bias test, Lord Goff put it this way (at p 670 F):

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard '(or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him. ...'
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> Lord Goff went on to substitute 'the opinion of the Court' for Lord Denning's 'reasonable people' in Lannon. Here is what he said on this point:
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> ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.
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> The 'real danger' test favoured in Gough could be seen as a compromise between 'the reasonable suspicion' of bias test and the 'real likelihood' of bias test so as to stress that the Court is contemplating a lower standard than 'likelihood' or 'probability of bias', that is to say, a 'real possibility of bias': see *Gough* at pp 668C-D, 670E-F, per Lord Goff; p 671B-C, per Lord Woolf.
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> It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R v Gough* per Lord Goff, at p 670D–E).
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> Having given careful consideration to the matter, we prefer the test of apparent bias given in *Gough* ('the real danger of bias' test) as this will avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias.

[16] MMHE submitted that although it was not in any way suggesting that I am actually bias, there will nonetheless be reasonable perception that I am bias against the inclusion of a vessel as construction works within the ambit of the CIPAA because of my antecedent views on it which was made public twice.

[17] On the other hand, EAT submitted that MMHE's concerns are misconceived as well as unfounded. The test is that of real danger of bias but there is none in the circumstances here. The application of the real danger of bias has been explained in the Court of Appeal case of *Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals* [2017] 3 MLJ 350 where Vernon Ong JCA (now FCJ) held as follows with emphasis added by me:

> [20] Quite apart from cases of automatic disqualification, disqualification may arise in a wide variety of circumstances which may extend beyond actual bias to perceived or apparent bias. Such interest, as Lord Goff in *Regina v Gough* put it, 'may vary widely in nature, in their effect, and in their relevance to the subject matter of the proceedings; and there is no rule, as there is in the case of pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be decided on its own facts'. In *Regina v Gough* and *Locabail (UK) Ltd*, it was decided that in cases other than those cases which fall

A within the category of automatic disqualification, a judge might be disqualified and his decision set aside if on an examination of all the circumstances the court concluded that there was a real danger of possibility of bias so that justice required that the decision should not stand. *What has emerged from these decisions is that the proof of actual bias is difficult as the law does not countenance the questioning of a judge about extraneous influences affecting his mind and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.*

[18] It is thus fact sensitive depending on the nature and circumstances of each case. On the facts here, EAT referred me to the English Court of Appeal case of *Locabail (UK) Ltd v Bayfield Properties Ltd and Another & Other Cases* [2000] 1 All ER 65 where the court comprising of Lord Bingham, Lord Woolf MR and Sir Richard Scott VC held as follows with emphasis added by me:

It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, *conceive of circumstances in which an objection could be soundly based on* the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or *previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers)*; or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground

for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

[19] Additionally, Andrew Phang Boon Leong JA held as follows in the Singapore Court of Appeal case of *BOM v BOK and another appeal* [2019] 1 SLR 349 with emphasis added by me:

166. *It is commonsensical and obvious that extrajudicial pronouncements are not binding on the courts*. We can, perhaps, do no better than to quote and endorse the following observations made by Lord Sumption in response to various essays on his extrajudicial lectures (see Lord Sumption, 'A Response' in NW Barber, Richard Elkins and Paul Yowell (gen eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) at ch 12 at p 213): ... *[T]here is no point comparing my lectures with my judgments on these issues and finding inconsistencies between them. Of course they are inconsistent. As a judge, I am not there to expound my own opinion. My job is to say what I think that law is. By comparison, in a public lecture, I am my own master. I can allow myself the luxury of expressing approval or dismay about the current state of the law*. You might wonder whether, in the highest court of the land, which is bound by no precedent even of its own, there is any difference between my own opinion and my exposition of the law. I have to tell you that there is and that it matters. *The personal opinions of the judges in the Supreme Court are only one element in the complex process of decision-making, and not necessarily the most important one. Statutes bind judges absolutely, within the limits of interpretative licence*. Established principle, reflected in existing case law, may not strictly bind them, but it is of fundamental significance. Even when the Supreme Court changes the law, it ought to do so within the framework of existing principle, unless there are particularly strong reasons for a more radical approach. Moreover, the Supreme Court's decisions are made collectively. Of course, a judge may dissent or he may concur for different reasons. This can be personally satisfying. But it is not much of a service to the public. It can also leave the ratio of the decision unclear, perhaps the worst sin that an appellate court can commit, short of actually getting the answer wrong.

167. Indeed, Lord Sumption was speaking of extrajudicial views expressed while he was a judge. His observations would apply, a fortiori, to an article written when the author concerned was not even a judge yet, as is the situation with the article concerned in the present appeal, namely *Phang* ([161] above). *BOM v BOK* [2018] SGCA 83 80 Undoubtedly, the article concerned would not be binding on this Court; it would not even be influential by dint of its provenance alone, save to the extent that it contained persuasive arguments that might be of assistance to the court ...

[20] Consequently, it is trite that a judge need not necessarily recuse himself or herself notwithstanding he or she may have made antecedent extrajudicial pronouncements or views by way of speeches, articles, etc. Justice Phang certainly did not do so in *BOM v BOK and another appeal* and he in fact

ultimately further wrote the judgment for the court.

[21] On the facts here, I might have formed a prior view on this issue that a FPSO is not a fixture and thus extraneous vis a vis the CIPAA but I am by no means bound by my own views. This issue is a neat question of law involving interpretation of statute. In this regard, I have no doubt that I remain capable of upholding my constitutional oath and duty to adjudge the issue impartially. I am nonetheless mindful that this issue was raised by me as pointed out by the plaintiff. This is however irrelevant because it involves an important issue of wide implication concerning the core jurisdiction of the adjudicator. There are potentially many similar CIPAA cases in the future. More importantly, it does not also matter so long natural justice is observed when both parties have been given full opportunity to ventilate their arguments to facilitate the making of my ultimate reasoned decision.

[22] On this footing, I conclude that there is no real danger of bias and I therefore decline to recuse myself.

SETTING ASIDE OF THE DECISION

[23] In OS 1, EAT contended that the adjudicator acted in excess of jurisdiction as well as denied EAT natural justice. In the premises, EAT is entitled to set aside the decision based on s 15 of the CIPAA which provides:

> 15 Improperly procured adjudication decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> (b) there has been a denial of natural justice;
>
> (c) the adjudicator has not acted independently or impartially; or
>
> (d) the adjudicator has acted in excess of his jurisdiction.

[24] In respect of jurisdiction, there are two issues raised by EAT, vis; the adjudicability of firstly a FSO vessel and secondly the AWO wherein MMHE's adjudication claim was premised. As to denial of natural justice, the allegations of EAT are that the adjudicator failed to consider material evidences and did not permit EAT to present its case on the remeasured contract price as well as EAT's loss and damage for breach of contract. Finally, EAT raised the issue that the decision was improperly procured by fraud because the adjudicator directed his mind based on false representations by MMHE.

ADJUDICABILITY OF A FSO VESSEL

[25] This is a critical issue which concerns the core jurisdiction of the adjudictor. In the absence of core jurisdiction, the decision is ipso facto bad. This issue may be revisited at any time notwithstanding that the adjudictor had dealt with it in his decision. In *Ranhill E&C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873, Mary Lim J (now JCA) held as follows with emphasis added by me:

> [41] But first, let me say that this issue of the jurisdiction of the adjudictor to hear and determine the dispute to start with is one that may or may not be disposed of by the adjudictor. The fact that an adjudicator decides on the issue, as was the case with Adjudicator Leon, or declines to do so, as was the case with Adjudicator Murali, is no reason to say that either is wrong or right.
>
> [42] *This issue of jurisdiction in any sense, whether that of the adjudictor's competence to hear the dispute, or whether the dispute concerned a matter that was within CIPAA 2012, may be brought up and dealt with at the adjudication proceedings. The fact that it was not; or, if brought up, how it was dealt with, does not deprive any party from raising the same issue again in proceedings in Court, be it in the setting aside application; or any other proceedings.*
>
> [43] The reasons are quite simple: at the time of the adjudication proceedings, the adjudictor should be allowed to get on with the substantive issues given the strict and limiting conditions that adjudication operates within. The fact that section 15 recognises the ground of excess of jurisdiction, without defining the meaning of 'jurisdiction', indicates that a challenge of jurisdiction is not lost if it was not raised in the adjudication proceedings; or if raised, cannot be brought up again ...

(See also *SQA Builders Sdn Bhd v Luxor YRM Sdn Bhd and another suit* [2018] 10 MLJ 759; [2017] 1 LNS 796, *TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd and another case* [2018] MLJU 217; [2018] 1 LNS 145 and *Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd and another appeal* [2019] MLJU 1477; [2020] 1 AMR 193.)

[26] In this respect, MMHE primarily contended that Lee Swee Seng J (now JCA) correctly held as follows in *MIR Valve Sdn Bhd v TH Heavy Engineering Sdn Bhd & Other Cases* with emphasis added by me:

> Whether the conversion work from a ship to the fpso vessel is construction work and hence the contract for the procurement of valves for that work
>
> [19] Under s 2 of the CIPAA, it is provided that the Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.
>
> [20] A 'construction contract' is further defined in s 4 to mean a construction work contract or construction consultancy contract.
>
> [21] What then is 'construction work'? The meaning is a technical and legal one, seeing that the Act has seen it fit to define it. It is thus not the meaning that would

ordinarily be given to the expression 'construction work' for then the scope would be as wide and as varied as one can possibly give to it. Section 4 of the CIPAA defines it as follows:

'construction work' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:

(a) Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

(b) Any road, harbour works, railway, cableway, canal or aerodrome;

(c) Any drainage, irrigation or river control work;

(d) Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or

(e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work, and includes:

(a) Any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

(b) Procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e). (emphasis added)

[22] To come within a 'construction contract' to which CIPAA applies, the contract between the claimant and respondent must either fall within the meaning of construction work or as in this case the procurement of equipment for construction work.

[23] *Under our CIPAA, unlike that of other jurisdictions, 'construction work' under (d) cover any gas, oil and petrochemical work. As can be seen, it is the nature of the work rather than what is being constructed that is more determinative when it comes to gas, oil and petrochemical. It is the purpose served by the structure built that is important rather than the structure built. Implicit in such a definition is that if the structure is more of a ship or vessel, if it nevertheless is work done for the gas, oil and petrochemical industry, then it would still qualify to be construction work being any gas, oil and petrochemical work.*

[24] Once it is established that the conversion work from a ship to an FPSO vessel is construction work, then the contract for the procurement of equipment such as valves for the FPSO vessel would qualify to be a 'construction contract'.

[25] One can immediately appreciate that the conversion of the ship to an FPSO vessel is such that the ship no longer serves the purpose of a ship but is now transformed into a different purpose; that of the oil and gas industry. This is where one must of necessity look at the functional purpose served by the conversion works and not the form of the structure with respect to its type of structure.

[26] With the conversion, it no longer serves the purpose of a ship in transporting people or goods from one place to another. Its predominant purpose is that of serving the gas, oil and petrochemical industry with respect to drilling for oil, gas and petrochemical, processing it, storing and offloading it. In short, it is now functioning like a refinery. True, it can still be moved from one place to another in exploring for gas, oil and petrochemical but no longer in the sense of transporting people or goods from one place to another.

[27] Its total character and purpose have been transformed such that though it bears the shape and structure of its former form, its function is now fitted for the oil, gas and petrochemical work. Its focus is forged with the fundamental change and alteration in what it can now do which previously it could not. It is now no longer a ship, but converted now into an oil rig cum refinery.

[28] The Wikipedia, accessed on 18 January 2017 defines and explained an FPSO unit as 'a floating vessel used by the offshore oil and gas industry for production and processing of hydrocarbons, and for the storage of oil. An FPSO vessel is designed to receive hydrocarbons produced by itself or from nearby platforms or subsea template, process them, and store oil until it can be offloaded onto a tanker or, less frequently, transported through a pipeline. FPSOs are preferred in frontier offshore regions as they are easy to install, and do not require a local pipeline infrastructure to export oil. FPSOs can be a conversion of an oil tanker or can be a vessel built specially for the application ...'.

[29] It is an agreed fact that what was being procured and supplied in the valves, is peculiarly necessary for it to serve the gas, oil and petrochemical activities. It was installed onto the converted ship; converted it into an FPSO vessel. The valves function as a connector of the pipes within which gases and crude oil are extracted and funnelled to the FPSO vessel.

[30] Like all definitions, one must look at pre-existing definition before any modification was done to it to discern what Parliament might have in mind with the modification introduced.

[31] Under the Petroleum Development Act 1974, there is already a definition for 'petroleum' in s 10 which is defined as follows:

10 DEFINITION.

For the Purpose of this Act, the expression 'petroleum' means any mineral oil or relative hydrocarbon and natural gas existing in its natural condition and casing head petroleum spirit including bituminous shales and other stratified deposits from which oil can be extracted.

[32] Really then, oil, referred to as mineral oil which has to do with exploration and exploitation of it and petrochemical referred to as relative hydrocarbon and gas referred to as natural gas are all inter-related and coming within the rough rubric of petroleum or what in industry parlance is called the 'oil and gas industry'.

[33] Then we have the definition of 'construction works' under a prior statute in the Construction Industry Development Board Act 1994 ('CIDB Act') which is word for word identical to that of CIPAA except for the missing word 'oil' between 'gas' and 'petrochemical'.

[34] It is only too obvious that the definition of 'construction work' has been taken from or to use a perforation term, 'cut and paste' from the CIDB Act. That is not uncommon if an existing definition serves fine for another statute.

[35] If one were to trace back earlier, there was already the definition for 'work of engineering construction' in s 3 of the Factories and Machinery Act 1967 as follows:

'work of engineering construction' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:

(a) any erection, edifice, structure, caisson, mast, tower, pylon, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

(b) any road works, dock, harbour works, railway, siding, cableway, tramway line, inland navigation, air field or aerodrome;

(c) any drainage, sewer, sewage works, irrigation, river control works, sea defence work or earth retaining structure;

(d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or

(e) any bridge, viaduct, dam, reservoir, lagoon, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works,

and includes:

(aa) any formwork, falsework, scaffold or any works which form an integral part of, or are preparatory to or temporary to, the works described in paragraphs (a) to (e);

(bb) site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

(cc) such other works as may be specified by the Minister.

[36] One cannot escape the similarities. Interestingly, 'premises' is defined in s 3 to include any building, place, or floating structure.

[37] If the site where the construction work is carried out is so important as in it must be affixed to the ground, then one would have thought that under s 2 CIPAA the bracketed words [at the site] would have been included as in:

This Act applies to every construction contract made in writing relating to construction work carried out [at the site] wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

[38] Even if it had been included, the definition of 'site' in s 4 is as follows:

'site' means the place where the construction work is affixed whether on-shore or off-shore; (emphasis added)

[39] *Therefore, even though the valves are installed on a converted ship that is now an FPSO structure that floats, that is nevertheless 'off-shore' as there is no requirement that the site must be affixed on the 'seabed'.*

[40] *It is true that 'site' is used with respect to site clearance and site restoration in s 4 of the definition of 'construction work' and in that context, it has reference to land which of course is on-shore as is discernible from the context in which it was used as follows:*

> *any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping.*

[41] *Be that as it may, one must give meaning nevertheless to the word 'off-shore' for as they say, it was not placed there for decorative purpose only! It is placed there purposefully to include gas, oil and petrochemical works done on an FPSO whether it be floating as in semi-submersible rig or in a floating platform or in a jack-up platform. In some of these structures, they are kept in place over the designated place of exploration and drilling by anchors on the seabed.*

[42] *Learned counsel for the respondent was prepared to make a distinction between an FPSO that is affixed to the seabed as qualifying to be affixed off-shore and hence not a chattel but would qualify to be construction work which must have some degree of affixation to the site. However, that must be differentiated from floating FPSO and semi-submersible rigs or platforms or vessels which he said are chattels.*

[43] *Surely such a fine distinction would do the 'oil and gas industry' no good for in the case of a jack-up rig, as pointed out by the claimant's learned counsel, initially it is affixed on the seabed and later jack-up. The degree of affixation is of no relevance but what is relevant is whether the work done on it is 'construction work' done in relation to the 'oil and gas' industry.*

Consequently, MMHE contended that the turret moored floating storage and offloading facility vessel involved here is within the ambit of the CIPAA; hence an adjudicatable matter.

[27] Further or alternatively, MMHE contended that the vessel is moored and connected; hence integral to the central processing plant ('CPP') of the Bergading offshore oil development field that is affixed to the seabed. This is illustrated in the following annexure of the contract:

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	PROVISION FOR DEMOLITION, REFURBISHMENT AND CONVERSION OF M.T. NAUTICA BERGADING (EX-SARK) INTO A FLOATING STORAGE AND OFFLOADING (FSO) FACILITY FOR FULL FIELD DEVELOPMENT (FFD) PROJECT, NORTH MALAY BASIN (NMB)	CONTRACT NO: EAT/MMHE/FSO/2014-003

1. INTRODUCTION

1.1 Project Background

The North Malay Basin (NMB) is located offshore Peninsular Malaysia immediately South of the Malaysia-Thailand Joint Development Areas (MTJDA) (Figure 1), approximately 150 km North East from Kota Bharu, in 55 to 60 m water depth. The NMB area consists of Blocks PM302, PM325 and PM326B. COMPANY Exploration & Production Malaysia B.V (COMPANY) and PETRONAS CarigaliSdnBhd (PCSB) are contractors to PETRONAS for the Production Sharing Contracts (PSCs) and have executed a Joint Operating Agreement (JOA) between them. Pursuant to the JOA, COMPANY and PCSB each hold 50% participating interest for the Blocks and COMPANY has been appointed the Operator. The proposed development project is located within Block PM302.

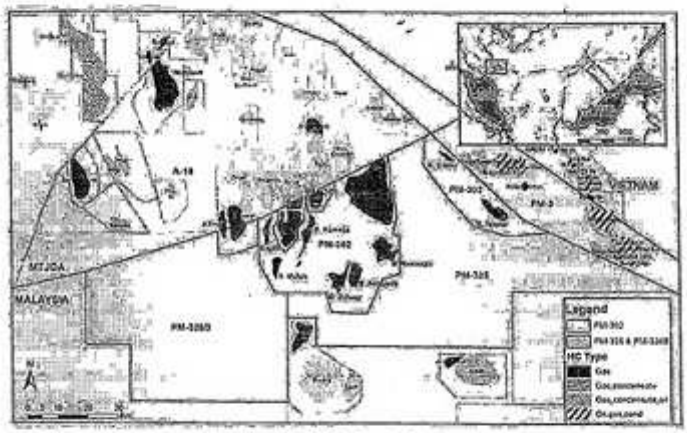

Figure 1.1 – North Malay Basin Development Area

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	PROVISION FOR DEMOLITION, REFURBISHMENT AND CONVERSION OF M.T. NAUTICA BERGADING (EX-SARK) INTO A FLOATING STORAGE AND OFFLOADING (FSC) FACILITY FOR FULL FIELD DEVELOPMENT (FFD) PROJECT, NORTH MALAY BASIN (NMB)	CONTRACT NO: EAT/MMHE/FSO/2014-003

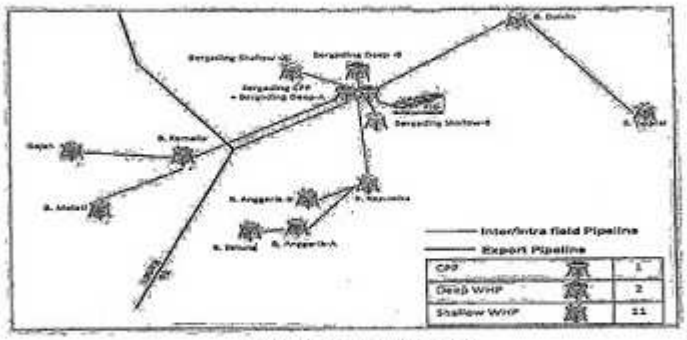

Figure 1.2 – Full Field Development

Part of the Full Field Development FSO, requires a Floating Storage and Offloading Facility to be stationed and tied-up to the Bergading CPP. The FSO is proposed to be a turret-moored vessel with a minimum storage capacity of 550,000 bbls (excluding reception and slops tanks). The vessel will be double bottom and double sided and will have a centreline bulkhead.

The stabilised condensate is transferred to the FSO via a pipeline.

The condensate from the storage tanks will be exported to a Shuttle Tanker via the stern of the vessel. The offloading pumps shall be designed to offload a minimum condensate parcel of 300,000 bbls for 24-hour period (17 hour pumping time, 4 hours mooring and 3 hours off-mooring). The cargo off take shall be via a floating hose string connected to the end of the offloading pipe, at the offloading station aft of the FSO. The condensate metering system shall provide fiscal measurement of the condensate discharged from the FSO.

A The CPP is therefore a fixture and this is not factually disputed by ETA. In the premises, the vessel in issue here is also plainly within the definition of s 4 of the CIPAA which included any integral part of 'construction work' as defined therein; hence an adjudicatable matter.

B **[28]** However, EAT counter contended that the legal analysis in the case of *MIR Valve Sdn Bhd v TH Heavy Engineering Sdn Bhd & Other Cases* is faulty. The definition of 'construction work' in s 4 of the CIPAA must be construed *ejusdem genereis* because all kinds of work stipulated therein are affixed to land. Consequently, it is insufficient that the work in issue such as the vessel here is C a specie of oil and gas work per se without any affixation to land. According to EAT, it would otherwise suffer a bizarre result such as, for example, a satellite which is a specie of telecommunication work being an adjudicatable matter under the CIPAA as well. This interpretation as relied by MMHE would D plainly affront the objective of the CIPAA statute.

[29] It is plain that I am not bound by the decision of *MIR Valve Sdn Bhd v TH Heavy Engineering Sdn Bhd & Other Cases* which is a decision of a court of coordinate jurisdiction. I have nonetheless meticulously read the decision for E purposes of dealing with the persuasive arguments advanced by both parties.

[30] The enactment of the CIPAA was initiated and steered by the Malaysian Construction Industry Development Board ('CIDB'). The ambit of the construction work as envisaged in the CIPAA would obviously be that as F entrusted to the CIDB in the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('LPIPMA'). Thus, the definition of 'construction works' in s 2 of the LPIPMA and s 4 of the CIPAA is identical save for the addition of 'oil' to 'construction work'. The definition of 'premises' in s 3 of the Factories and Machinery Act 1967 is however not found in the LPIPMA. In this regard, I G managed to scrutinise the CIPAA draft bill proposed by the CIDB and discover that s 2 as proposed therein is actually identical to that as set out in para [37] of the judgment in *MIR Valve Sdn Bhd v TH Heavy Engineering Sdn Bhd & Other Cases*. It is unclear whether the omission of 'the site' in s 2 of the CIPAA is deliberate or accidental by the legislature. I have reviewed the Hansard which H sets out the Deputy Minister's Speech at the second reading of the Bill to introduce CIPAA both at Dewan Rakyat on 2 April 2012 and at Dewan Negara on 7 May 2012 but found nothing of assistance.

[31] In the circumstances, I share Justice Lee's analysis and conclusion in I *MIR Valve Sdn Bhd v TH Heavy Engineering Sdn Bhd & Other Cases* on the interpretation of ss 2 and 4 of the CIPAA. It is jurisprudentially sound. The counter contention by EAT that s 4 of the CIPAA should be construed ejusdem generis is misplaced because the appropriate genus of 'affixed work' could not, in my view, be satisfactorily discerned from of sub-ss (a)–(e) of s 4 of the CIPAA

per se based either on the literal interpretation of the statute following the Federal Court decision of *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173; [2012] 4 CLJ 445 or the purposive interpretation of the statute pursuant to s 17A of the Interpretation Act 1967. It requires legislative amendment to give effect to the same.

[32] That aside and as contended by MMHE, I am also satisfied that the vessel is physically and functionally integrated to the CPP which is a fixture affixed to the seabed. In the premises, it is an integral part within the definition of 'construction work' in s 4 of the CIPAA even if s 4 of the CIPAA is construed in the way as argued by EAT.

[33] Consequently, I find and hold that a FSO vessel particularly the vessel here is an adjudicatable issue within the core jurisdiction of the adjudictor in the adjudication proceedings.

Adjudicability of the AWO

[34] Next as to EAT's contention that the AWO are not construction contracts adjudicatable by the adjudictor, EAT basically contended that the AWO were not part of the contract but separate contracts in themselves. The AWO could not therefore be encompassed within the payment claim as pursued by MMHE. There is, in other words, absence of core and/or contingent jurisdiction. In this regard, EAT relied on the case of *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd & Other Cases* [2017] 1 LNS 601 where Lee Swee Seng J (now JCA) held as follows with emphasis added by me:

> [59] However here we are talking about his core jurisdiction as in whether CIPAA confers jurisdiction on an Adjudicator with respect to the type of 'construction contract' that falls within the ambit and powers of an Adjudicator under the scheme of statutory adjudication. Thus a construction contract for the construction of a house by a natural person for the buyer's occupation and a non-payment under it would not be a matter that is covered under CIPAA because of its non-application section under section 3 CIPAA. Likewise a construction contract for construction work carried out wholly outside the territory of Malaysia. So too would be a shipping contract or a mining contract which does not fall within the meaning of 'construction work' under section 4 and hence not a 'construction contract' under section 2 and 4 of CIPAA.
>
> [60] An Adjudicator cannot adjudicate a Payment Claim made under any contract but only one made under a 'construction contract' as set out under the 'Application' section in section 2 and as defined in section 4 and as one not coming within the non-application provision of section 3.
>
> [61] *Where CIPAA does not confer jurisdiction on the adjudictor to adjudicate a Payment Claim because it does not fall within the meaning of 'construction contract' then the adjudictor cannot erroneously assume jurisdiction. This is because it relates to his core*

jurisdiction which Parliament under CIPAA has not conferred jurisdiction on him.

[62] *Where an Adjudicator makes an error with respect to his core jurisdiction, this Court is at liberty to set the decision aside on ground that he had no jurisdiction to adjudicate and hence exceeded his jurisdiction by proceeding to adjudicate when he should not have.*

According to EAT, all variation works ordered pursuant to the contract must solely and strictly be governed by srticle 13 of the conditions of contract. Consequently, MMHE should not be allowed to unlawfully and unfairly foist a non contractual regime upon EAT as done in respect of the AWO.

[35] In opposition, MMHE contended that the adjudictor plainly had jurisdiction because the AWO are variations to the contract by virtue of the Marine Business Unit Standard Procedure and Forms which is part of the contract.

[36] The learned adjudicator held as follows in his decision:

59. Against the backdrop of the contractual provisions above, I am agreeable to the Claimant that the AWO, which forms the basis in which the Respondent issued instructions to proceed with Additional Works, is a document annexed to the MMHE Marine Business Unit Standard and Procedure and Forms. Even if I am wrong, I am agreeable with the Claimant that the Respondent in fact had signed thousands of AWOs to govern the administration of Additional Works under the Contract without any reservation or qualification whatsoever on the material time. As such, based on the evidence before me, I am agreeable to the Claimant that MMHE's Standard Procedure and Forms are part of the documents governing the Contract.

[37] Since this is a jurisdictional issue which I may revisit afresh, I have accordingly reviewed the documents that formed the contract as well as the related AWO and correspondences exhibited in the affidavits adduced by both parties.

[38] The relevant provisions of the contract are Article 1 of the Conditions of Contract read together with cl 6 of the Additional Provisions in Appendix B (Yard's Revised Commercial Proposal dated 4 June 2015), Appendix E and Appendix F of the contract. They read as follows:

CONDITIONS OF CONTACT

ARTICLE 1 – CONTRACT DOCUMENTS

1.1 The following CONTRACT documents together constitute the CONTRACT.

A) CONDITIONS OF CONTRACT (Articles 1–44 inclusive)

B) ...

C) APPENDIX

...

Appendix B Yards Revised Commercial Proposal dated 4th June 2015

...

1.2 The order of prevalence amongst the Contract documents is as follows:

(a) CONDITIONS OF CONTRACT

(b) Appendix A, B, C, D, E, and F, followed by

(c) Schedule 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

In the event of ambiguity, inconsistency, or conflict between the CONDITIONS OF THE CONTRACT and APPENDIX, the APPENDIX shall take precedence and prevail.

1.3 Any reference or details provided in any one of the above documents but not in others shall be taken as read in all documents in this Contract.

and

APPENDIX B

Additional Provisions

6. Acceptance of this quotation shall included acceptance of MMHE's Standard Conditions of Contract a copy of which is attached to this quotation together with acceptance of MMHE's MBU's standards and its Quality General Procedure and Classification Society, BV.

...

APPENDIX E

Technical Clarification (MMHE – EAT)

APPENDIX F

Technical Clarification (EAT – MMHE)

[39] I find that the MBU's Standards and its Quality General Procedure and Classification Society, BV issued by MMHE, amongst others, provided for the management of variation orders, additional works order and change order (document number NMB-FSO-PMG-PRO-000-5000) ('MBU Standard and Procedures') including the claim procedure in cl 6 thereof.

[40] From my review of the AWO, I find that they were issued by EAT based on the MBU Standard and Procedure as evident by the forms that were utilised specifically when the additional works were ordered by MMHE.

[41] In the circumstances, it is plain to me that the AWO were made pursuant to the Contract which is plainly in writing. This is clearly so from the holistic construction of the Contract. In this regard, I also noted that in *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case* [2017]

MLJU 146; [2017] 1 LNS 185, Lee Swee Seng J (now JCA) held as follows with emphasis added by me:

> [56] *Clearly an expansive and generous interpretation is to be given to the meaning of a 'contract made in writing' in line with the purpose of CIPAA* which is captured to some extent by its long title that reads:
>
> > An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.
>
> [57] *It must be borne in mind that generally it is the Employer that would rely on the fact that there is no construction contract in writing to defeat or delay a Payment Claim for work done*. The Claimant/Contractor on the other hand has a limited time frame to complete the works and it cannot be that if he does the work, he is damned if there is no concluded contract in that further documents are to be signed! Conversely, if he does not commence work, as in this case when completion date is from the date of site possession which had already been given, he runs the risk of late completion and be damned with LAD claims!
>
> [58] *When the Respondent here had every opportunity to stop the Claimant from starting the balance Works until those further Contract Documents are signed, it must mean that the Respondent had waived that requirement or is otherwise estopped from contending otherwise by their very conduct*.

[42] I am mindful that EAT attempted to distinguish the AWO from the contract that a valid variation under the contract can only be validly made pursuant and subject to the procedure on changes set out in article 13 of the conditions of contract. This is however flawed because it is plain as set out in articles 1.2 and 1.3 of the conditions of contract read together that the MBU Standard and Procedures incorporated via Appendix B prevailed and took precedence over article 13 of the conditions of contract.

[43] I am further mindful that EAT referred and relied upon the minutes of the Technical Clarification Meeting dated 21 April 2015 which is part of Appendix F to the contract that variation works must be dealt in accordance with the article 13.7 of the conditions of contract. The relevant minutes read as follows:

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	PROVISION FOR DEMOLITION, REFURBISHMENT AND CONVERSION OF M.T. NAUTICA BERGADING (EX-SARIK) INTO A FLOATING STORAGE AND OFFLOADING (FSO) FACILITY FOR FULL FIELD DEVELOPMENT (FFD) PROJECT, NORTH MALAY BASIN (NMB)	CONTRACT NO:SAT/MMHE/FSO/2014-003

TECHNICAL CLARIFICATION NO. :COC TC#01
DATE: 21st APRIL 2015 (revised 1 JULY 2015)

13.1 Changes	As the WORK progress, OWNER may desire changes to the WORK which may include an increase or decrease in the quality, character, quantity, kind or execution of WORK or any part thereof as part thereof as well as the duration of CONTRACT. These changes may affect the cost or the time required for the WORK.	OWNER disagreed. YARD to comply. Charge quality to quantity.	To be discussed with Owner. Agreed with condition that the changes should NOT be substantial i.e. should not reduce by more than 10% in value	Agreed; Closed
13.2 Changes	If OWNER desires changes to the WORK, OWNER may issue Field Instruction to YARD specifying the requested action to be taken by YARD. Upon agreement on adjustment to the ESTIMATED CONTRACT PRICE and/or schedule Mechanical Completion date of the WORK, YARD shall be obligated to make the changes and response OWNER within the stipulated in the Site Instruction. These changes will be measured / remeasured and valued for payment in accordance with SCHEDULE 3 - COMPENSATION in the Contract.	OWNER noted	Closed / The word "ESTIMATED" in 13.2 has to be removed	Closed; the word "ESTIMATED" change to "PROVISION"

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18/3/20

1090

	PROVISION FOR DEMOLITION, REFURBISHMENT AND CONVERSION OF M.T. NAUTICA BERGADING (EX-SARIK) INTO A FLOATING STORAGE AND OFFLOADING (FSO) FACILITY FOR FULL FIELD DEVELOPMENT (FFD) PROJECT, NORTH MALAY BASIN (NMB)	CONTRACT NO:EATMMHE/FSO/2014-003

TECHNICAL CLARIFICATION NO. :COC TCR01
DATE: 21st APRIL 2015 (revised 1 JULY 2015)

13.3 Changes	No adjustment to the Schedule Mechanical Completion Date, or ESTIMATED CONTRACT PRICE shall be made made pursuant to this WARP, except by the issuance by OWNER of a document known as Variation Order. In addition to the Provision, the schedule Mechanical Completion Date alone would be subjected to adjustment pursuant to Force Majeure as per Article 32 and for any act or omission of Owner as per In Article 13.4. The Variation Order shall set forth the change in WORK, whether increase or decrease, and the corresponding adjustment to the ESTIMATED CONTRACT PRICE, and/or Schedule Mechanical Completion Date, and shall set forth the basis on which YARD shall be compensated for the change.	OWNER noted.	Closed The word "ESTIMATED" in 13.3 has to be removed	Closed; the word "ESTIMATED" change to "PROVISION"
13.5 Changes	YARD on its own initiative and for good reason may request OWNER to issue Field Instruction regarding a change in the WORK or an adjustment to the Schedule Mechanical Completion Date or ESTIMATED CONTRACT PRICE. Good reason would include such purpose as suggesting a technical change in the CONTRACT to improve the WORK or asking for an adjustment to the Schedule Mechanical Completion date because of Force Majeure as per Article 32. The acceptance or rejection of the said Change Order, shall not in any way relieve YARD of its obligations in the execution of the Work in accordance with the term of this CONTRACT.	OWNER noted	Closed The word "ESTIMATED" in 13.5 has to be removed	Closed; the word "ESTIMATED" change to "PROVISION"

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However upon my reading of the aforesaid minutes, I find that it specifically concerned only the clarification on the interpretation of article 13 of the conditions of contract as raised by MMHE but not on the interaction or conflict between the MBU Standard and Procedures and article 13 of the conditions of contract. The minutes did not expressly state that the latter prevail and take precedence over the former.

[44] There were many AWO issued for changes or variations during the performance of the contract (which led to the eventual conflict or dispute between the parties). Upon their issuance as instructed by EAT, I however find that EAT did not raise objection to the contents of the AWO at all material times on their issuance that they were not in accordance with the procedure in article 13 of the conditions of contract save only on its qualification on the price and costs stated therein. It must thus be deemed that EAT had waived, acquiesced or accepted that they were issued pursuant to the contract. Accordingly, EAT is also estopped from insisting on strict compliance of article 13 of the conditions of contract.

[45] In the premises, I therefore also find that the AWO were properly issued pursuant to the contract and is hence an adjudicatable issue within the core and/or contingent jurisdiction of the adjudictor in the adjudication proceedings.

DENIAL OF NATURAL JUSTICE

[46] EAT firstly contended that the adjudictor failed to consider material evidences, and secondly, the adjudictor did not permit EAT to present its case on overpayment of the remeasured contract price as well as EAT's loss and damage due to breach of contract. In this regard, EAT referred and relied on the Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479 where Zulkefli Ahmad Makinuddin PCA held as follows with emphasis added by me:

> [64] *It follows that the 'duty and obligation of the adjudictor' as spelt out in s 24(c) of CIPAA that 'he shall comply with the principles of natural justice' would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartiality*.
>
> [65] *We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice*. This point arose in *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At [24-28] the learned judge observed:
>
> > [24] It seems to me clear beyond doubt that the adjudictor erred in failing to take into account Breyer's defence by reference to the over-payment on batches 1–25. Whilst he was quite correct to regard the notice of adjudication as setting out the

boundaries of his jurisdiction, he failed to appreciate that what Pilon were seeking by that notice was not only an interim valuation of batches 26–62, but also an interim payment of any sum considered owing to them. Whilst the valuation required him to have regard to batches 26–62 only, the concomitant claim for payment meant that the adjudictor was obliged to consider whether Breyer were right to say that a much smaller net payment was due than that contended for by Pilon, because Pilon had already been overpaid on batches 1–25. In other words, the notice of adjudication gave the adjudictor the jurisdiction to consider what, if any, further sum should be paid by way of interim payment from Breyer to Pilon and that issue, of necessity, involved a consideration of Breyer's defence based on the alleged over-payment on batches 1–25.

[25] It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words: that was, for example, what went wrong in Broardwell. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set off), and thus such defences will ordinarily be encompassed within the notice of adjudication.

[26] As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

[27] I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudictor's jurisdiction in a way in which that party believes to be to its advantage. I am in no doubt that is what happened here: Pilon did not wish the adjudictor to have any regard to batches 1–25, and therefore deliberately limited the scope of the adjudication notice to batches 26–62. It was their case that the over-payment claim was outside the adjudictor's jurisdiction, and that is what they (successfully) urged on the adjudictor. Thus, this is a case where Pilon sought a tactical advantage by putting forward an erroneous statement of the adjudictor's jurisdiction and, as the decision in Quartzelec shows that can be a dangerous tactic to adopt.

[28] In the result therefore, I consider that the adjudictor deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice ...

Reliance was also made by EAT on the subsequent Court of Appeal case of *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542; [2019] 1 CLJ 592 where Harmindar Singh Dhaliwal JCA held as follows:

[30] In any event, the refusal of the adjudictor to consider the defence, or at least the preliminary report, on the basis that it was not raised in the payment response goes

against the Federal Court decision in View Esteem. The law as it stands now is that the adjudictor is obligated to consider all defences raised by a respondent in the adjudication response. If the adjudictor fails to do so, he or she does not properly perform the task which he or she has been appointed to do and can be said to have not acted in accordance with natural justice (see *Quartzelec Ltd v Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC) at para 31).

[47] In retort, MMHE contended that the adjudictor had in fact duly considered EAT's defence including its counterclaim but dismissed the same.

[48] The learned adjudicator held as follows in his decision:

72. With respect to the overpayment of the Remeasured Contract Price, I have considered both parties submissions pertaining to the overpayment of the Remeasured Contract Price. As such, I am agreeable to the Claimant's reply at Part F of the Adjudication Reply which the parties were in without prejudice negotiations and the Respondent has not provided any evidence to support its allegation that the parties have agreed to the Remeasured Price. As a result, I find that there is no basis for the Respondent to make such deduction of US$8,646,553.97 in this Adjudication Proceedings.

...

[74] Lastly, for the US$4,027,644.02 being damages for loss and damage suffered by the Respondent due to the Claimant's breach of Contract, I have considered both parties submissions pertaining to the loss and damage of US$4,027,644.02 suffered by the Respondent. As such, I am agreeable to the Claimant's reply at paragraphs 105 to 115 of the Adjudication Reply, in any event, I find that no evidence has been submitted before me in relation to actual cost incurred by the Respondent relating to the aforesaid loss and damage. As such, I shall dismiss the Respondent's deduction of US$4,027,644.02 under this head of claim.

[49] The application under s 15 of the CIPAA is not an appeal. In the Court of Appeal case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776; [2016] 1 LNS 1522, David Wong JCA (later CJ (Sabah and Sarawak)) held as follows with emphasis added by me:

[21] There were no complaints by the Appellant that the adjudictor had got the disputes on a completely wrong footing. In fact, no complaint was made at all and the adjudication process was carried out premised on those issues. *If we were to consider the complaints of the Appellant, we would be looking into the merits of the decision of the adjudictor. In the context of section 15 of CIPPA 2012, it cannot be the function of the Court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudictor to assess and decide on.* The Court's function is simply to look at the manner in which the adjudictor conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the Appellant. In the context of this case, the complaints of the Appellant were nothing but complaints of

A factual findings of the adjudictor which in our view cannot be entertained by us.

(See also *Enra Engineering and Fabrication Sdn Bhd v Gemula Sdn Bhd and another summon* [2019] MLJU 369; [2019] 10 CLJ 333).

B **[50]** It is clear to me that EAT is questioning the merits of the adjudictor's decision here. This is unlike what happened in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* and *Mecomb Malaysia Sdn Bhd v VST M&E Sdn Bhd* [2018] MLJU 265; [2018] 8 CLJ 380 where the adjudictor was found to have abdicated his duty in not considering the respondent's defence therein because C of having mistakenly held that he had no jurisdiction to entertain it. It cannot be disputed that the learned adjudicator dealt with the defences of EAT here but he dismissed them. The decision of the adjudictor is binding by virtue of s 13 of the CIPAA even if he has wrongly answered the right questions or issues including on the adequacy or otherwise of adduction of evidence before him. If D EAT is dissatisfied with it, the recourse is to have it finally determined either by arbitration or litigation in court. This is the peculiar nature of statutory adjudication. It is not in dispute that the parties are presently having their disputes resolved in arbitration ('arbitration').

E **[51]** Premised on the above, I therefore find that EAT did not make out a case on denial of natural justice on the part of the adjudictor.

Decision improperly procured through fraud

F **[52]** Finally EAT raised the issue that the decision was improperly procured by fraud because the adjudictor directed his mind based on false representations by MMHE. In this respect, EAT contended that MMHE falsely represented to the adjudictor that the MBU Standard and Procedures in its entirety including portions which govern the AWO formed part of the G contract. According to EAT, MMHE took a contradictory stand in its adjudication claim versus its adjudication reply. In the former, it was stated that the MBU Standard and Procedures had been incorporated from the date the contract had been executed whereas in the latter, it was stated the MBU Standard and Procedures has been incorporated months after the execution of H the contract pursuant to the alleged discussions and agreement between the parties. Furthermore, EAT has taken a different stance in the Arbitration in that the MBU Standard and Procedures comprised only of two documents for purposes of the contract. Consequently, in crux, EAT complained that MMHE concealed this aspect of their case from the adjudictor to better its I prospects of convincing the adjudictor that the AWO formed part of the contract. For this purpose, EAT referred and relied on the English case of *PBS Energo AG v Bester Generacion UK Ltd* [2019] EWHC 996 (TCC) that the court must be robust not to allow the statutory policy of enforcing the temporary finality of adjudication decision be simply undermined by fraud.

[53] In response, MMHE contended that EAT's allegation of fraud is wholly wanting. It is a bare averment devoid of details of cause and effect and must accordingly fail in limine. MMHE too referred and relied on the English case of *SG South Ltd v King's Heed Cirencester LLP* [2009] EWHC 2645 (TCC) where Akenhead J held as follows on fraud in relation to adjudication proceedings with emphasis added by me:

> 20. Some basic propositions can properly be formulated in the context albeit only of adjudication decision enforcements:
>
> (a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.
>
> (b) *If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgement, it must be supported by clear and unambiguous evidence and argument.*
>
> (c) *A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former.*
>
> (d) *Addressing this latter case, one needs to differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it.* Examples of the first category are where it is later discovered that the certificate upon which an adjudication decision is based is discovered to have been issued by a certifier who has been bribed or by a certifier who has been fraudulently misled by the contractor into issuing the certificate by a fraudulent valuation. Examples of the second category are fraud on another contract or cross claims arising on the contract in question which can only be raised by way of set off or cross claim. Whilst matters in the first category can be raised, generally those in the second category should not be. The logic of this is that it is the policy of the 1996 Act that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims; put another way, enforcement should not be used to facilitate fraud; fraud which does not impact on the claim made upon which the decision was based should not generally be deployed to prevent enforcement.

[54] The finding of fraud is obviously fact sensitive depending on the circumstances in each case. It substantially hinges on the quality of the evidence presented to substantiate that there was indeed fraud. I observed that EAT is attempting to demonstrate fraud having occurred here by comparing the conduct of MMHE within the adjudication proceedings itself as well as the

conduct of MMHE in the adjudication proceedings versus that in the presently ongoing arbitration proceedings between both the parties.

[55] In the regard, I noticed that there are no authoritative notes of proceedings or cogent correspondences adduced in the affidavits here of both the adjudication and arbitration proceedings to enable me to make any meaningful appraisal of what actually happened. It seems that EAT expected me to make inferences and consequential finding of false representation amounting to fraud by MMHE based on argument only.

[56] The charge of commitment of fraud is a serious one. Although fraud has been given a wide generic meaning that includes cheating, deceit and dishonesty by the Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418, I however find that I am not in the circumstances here armed with any cogent evidence to make an adverse finding against MMHE even on the standard of proof on the balance of probabilities as laid down by the Federal Court case of *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1; [2015] 4 CLJ 561.

[57] Be that as it may, I further find that EAT's allegations of fraud primarily centered on the exact constituents of the contract documents. This is evidentiary and all the relevant documents that allegedly formed the contract were adduced before the adjudictor. Moreover, both parties were afforded the opportunity to make their respective representations before the adjudictor on them. I thus find and hold that if the adjudictor is however persuaded by MMHE, albeit incorrectly or even misleadingly, this is not fraud as envisaged by s 15(a) of the CIPAA to warrant the setting aside of the decision. In other words, it is not the specie of fraud that impacts the subject matter of the decision as illustrated in *SG South Ltd v King's Heed Cirencester LLP*.

[58] In summary, I conclude that EAT has not successfully made out a meritorious challenge against the decision under s 15 of the CIPAA.

Enforcement of the decision

[59] It is provided in s 28 of the CIPAA as follows:

> 28 Enforcement of adjudication decision as judgment
>
> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

(2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.

(3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

[60] In *Tan Eng Han Construction Sdn Bhd v Sistem Duta Sdn Bhd* [2018] 12 MLJ 395; [2018] 1 LNS 428, Lee Swee Seng J (now JCA) held as follows with emphasis added by me:

> [38] *In a case where there is no application to set aside an Adjudication Decision, the Court upon being asked to enforce the Adjudication Decision would ordinarily grant an order in terms of the application to enforce unless there is patent non-compliance with the requirements of the CIPAA* such as the following:
>
> 1. That the dispute is not one within the core or original jurisdiction of the adjudictor;
>
> 2. That the Decision is a void Decision under section 12(3) of the CIPAA being made outside the period specified in section 12(2);
>
> 3. That the Decision is not in writing and does not contain reasons for such Decision under section 12(4) of the CIPAA;
>
> 4. That the Decision has not determined the adjudicated amount and the time and manner the adjudicated amount is payable.
>
> ...
>
> [41] Even though this application is not being opposed this Court would still be concerned that the matter decided upon by the adjudictor must be one ostensibly falling within the core or original jurisdiction of the CIPAA.
>
> [42] The reason is obvious enough: if the adjudictor has no jurisdiction over the dispute then the Decision given is null and void and unenforceable.

However in the recent Court of Appeal case of *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229, it was held that the enforcement of an adjudication decision can only be resisted provided there had been an active challenge against it pursuant to s 15 of the CIPAA including on excess of jurisdiction. A passive challenge is ineffective.

[61] On the facts here, EAT has made an active challenge via OS 1 including based on the lack of core and/or contingent jurisdiction on the part of the adjudictor but I have found in para [57] above that the challenge is unmeritorious.

[62] It consequently follows that MMHE has successfully made out its case to have the decision enforced pursuant to s 28 of the CIPAA.

A CONCLUSION

[63] For the foregoing reasons, I therefore dismiss OS 1 with costs of RM30,000 subject to 4 % allocator. In addition, I allow OS 2 with costs of RM30,000 subject also to 4% allocator.

B

OS 1 dismissed with costs of RM30,000 and OS 2 allowed with costs of RM30,000.

Reported by Ahmad Ismail Illman Mohd Razali

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